IN THE MISSOURI SUPREME COURT

STATE EX REL. KENNETH BAUMRUK,	)	
	)	
RELATOR,	)	
	)	
VS.	)	NO. SC86040
	)	
THE HON. MARK SEIGEL,	)	
	)	
RESPONDENT.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HON. MARK SEIGEL, CIRCUIT JUDGE OF ST. LOUIS COUNTY.
TWENTY-FIRST JUDICIAL CIRCUIT, STATE OF MISSOURI

RELATOR'S REPLY BRIEF

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Respondent's statement of facts asserts, without citation to the record, that for the approximately sixteen months following relator's new defense attorneys entered their appearances,

> Judge Seigel held informal discussions with the parties abut the change of venue and potential locations for the trial. *At all times, Judge Seigel indicated his intention to remain the judge in the case wherever the trial would be held*. At no time did relator make a request that Judge Seigel issue a written order granting the change of venue or memorializing the informal discussions.

(Resp.Br. 17; emphasis added).

In his argument, respondent claims, again without citation to the record, "Respondent discussed various venues with the parties *and indicated his intention to remain the trial judge on the case* (Resp.Br. 22; emphasis added).

The only sort of "record" relator has located appears to be the statements made by the state and defense counsel at the hearing held May 14, 2004. At that hearing, the prosecutor initially acknowledged there had been several discussions about the change of venue, specifically, whether the change should be to Jackson County or St. Charles County (RespEx-10, 4-5). The prosecutor then stated,

I don't think it is accurate to say that there has (sic) not been discussions of the parties that the judge from St. Louis County would not try this case. I think it's been the understanding, from the State's perspective, to remand this Court clearance to take the case to another county other than St. Louis County.

(RespEx-10, 5).

Defense counsel responded,

I want the record to clearly reflect that this request for us to have the Court recused from the case or have the Court recuse himself from the case, is not something at the last minute.

There were discussions at the outset. We advised the Court, told the Court from the very outset that this was Mr. Baumruk's wishes, that we file a request for change of venue – excuse me – file a request for change of judge and those discussions have been had as well and the Court is well aware, I believe it's fair to say, the court was well aware before we filed this motion, that there were going to be issues with respect to the judge – to this judge hearing this case.

So by the same token the prosecutor says we had discussions about change of venue, we also had discussions about the change of judge...

> I think the record should reflect there had been discussion at the outset indicating that this was our intention to file a motion to have the Court recuse itself and so, to say that we proceeded without complaint is inaccurate.

(RespEx-10, 11-12; see also RespEx-10, 19).

Because respondent has not cited to the record, relator does not know the source of respondent's claims. Nor is relator able to reply other than as he has done, above.

JURISDICTIONAL STATEMENT, STATEMENT OF FACTS, POINTS RELIED ON, AND ARGUMENT AFFIRMED

Relator affirms, and incorporates by reference as though fully set forth herein, his initial Statement, Brief and Argument. In limiting his reply to specific parts of respondent's brief, appellant is not conceding to any portion of, or argument in, respondent's brief not expressly addressed.

REPLY ARGUMENT

As to Respondent's First Point and Argument: Respondent's argument – he has discretion to remain on the case after granting a change of venue and relator is not entitled to a writ of prohibition – must fail in that: 1) the plain language of Rule 32.04(e) precludes its application in this case; 2) whatever may be the grounds of the motions for change of judge and change of venue, when a party desires both they must be filed together and Rule 32.08(e) – which respondent correctly characterizes as "procedural" – controls the procedure to be followed; and 3) because Rule 32.08 does not expressly specify the procedure to follow when a change of venue is granted to a county in a different circuit, the Rule must be construed by examining the legislative intent which is determined by looking at all of Rule 32 including Rules 32.13 and 32.14;

The plain language of Rule 32.04(e) refutes respondent's argument and this Court's opinion in Baumruk eliminates respondent's options.

Respondent appears to argue that because, under Rule 32.04(e), "in lieu of transferring the case to another county, the court *may* secure a

jury from another county," respondent may take himself to another county to "secure" said jury (Resp.Br. 22; emphasis added). There are two problems with this argument.

First, respondent's constrained reading belies the plain language of Rule 32.04(e): the attempt to construe the Rule to authorize something it plainly does not is unacceptable. "[W]here the language of a statute is unambiguous, [the court] will give effect to the language as written and will not resort to rules of statutory construction." *Martinez v. State*, 24 S.W.3d 10, 16 (Mo.App.E.D. 2000); *State v. Rowe*, 63 S.W.3d 647, 649-50 (Mo.banc 2002) ("Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning"). The plain and ordinary meaning of the "in lieu" provision of Rule 32.04(e) provides no authority for a circuit judge to transfer himself to another jurisdiction to secure "a jury from another county."

Second, as discussed in relator's initial brief, this Court's mandate directed and instructed respondent "to grant [relator's] motion for change of venue." *State v. Baumruk*, 85 S.W.3d 644, 646, 651 (Mo.banc 2002). The mandate did not give respondent the option of securing a jury from another county "in lieu" of ordering a change of venue. The mandate eliminated that option.

Whatever may be the grounds of the motions for change of judge and

change of venue, when a party desires both they must be filed together and Rule 32.08(e) – which respondent correctly characterizes as "procedural" – controls the procedure to be followed.

It appears that respondent attempts to avoid Rule 32.08(e) by claiming it is "merely procedural" and Rules 32.02, 32.03 and 32.04 provide substantive grounds (Resp.Br. 23). The problem with this argument is that "the grounds" for granting a change of venue are no longer at issue: this Court having *ordered* a change of venue, no further discussion of "grounds" is necessary.

The only question left is the procedure to be followed in the change of venue, and Rule 32.08 applies. Respondent's argument proves this point: "Rule 32.08 provides a procedure for courts to follow when a defendant seeks a motion for change of judge and change of venue at the same time" (Resp.Br. 23).

Respondent does disagree with relator's argument that Rule 32.08 does not expressly address the question of whether a judge who orders a change of venue to another jurisdiction may remain on the case as though the change were merely to another county in the home jurisdiction. Respondent simply argues that relator has misconstrued the Rule (Resp.Br. 23).

Respondent argues this Court should not look at the civil rules (see

Rel.Br. 26-28). Specifically, respondent complains that the civil rules providing for change of venue – Rules 51.02, 51.03 and 51.04 – "do not give a judge in a civil proceeding the option to remain with the case after granting a change of venue" and therefore the (Resp.Br. 24). Respondent overlooks Rule 51.06(c) which provides precisely that option: "If the change of venue is denied or if the change of venue is to another county in the same circuit, the newly assigned judge shall continue to be the judge in the civil action" (Resp.Br. A8).

In its preliminary writ, this Court expressly directed respondent to Rules 32.14 *and* 51.14 (Rel.Br. A59). Relator's initial brief discussed Rule 51.14 (Rel.Br. 26-28).

Although respondent has not addressed Rule 32.14, relator suggests both Rule 32.13 and 32.14 support relator's argument that a judge may not remain on a case when venue is changed to a different circuit.

This Court must consider all of Rule 32, including Rules 32.13 and 32.14, in determining legislative intent and construing Rule 32.08.

"The primary purpose of statutory interpretation is to determine the intent of the legislature from the words used in the statute and give effect to that intent." *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 166-67 (Mo.App.W.D. 1999). "[T]he fundamental rule of construction [is] that one part of a statute should

not be read in isolation from the context of the whole act." *Martinez*, *supra*, 24 S.W.3d at 16. "In ascertaining legislative intent it is proper that provisions of the entire act be construed together and, if reasonably possible, all provisions should be harmonized." *Id.* *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (The court's duty is to "give effect, if possible to every clause and word of a statute…").

Rule 32.13 provides: "A court which has granted a change of venue may annul the order, with the consent of the parties, at any time before the papers or transcript are filed in the court to which the venue as changed" (Rel.Br. A9). Rule 32.14 provides: "The court to which any criminal proceeding shall be transferred by change of venue shall have jurisdiction to hear and determine the same as if it had originated there." What is the effect of these Rules?

If the state is correct, if a trial judge could grant a change of venue and go with the case to a different circuit, these rules would be meaningless. Rule 32.13 would meaningless because regardless of when the papers were filed, the home court's jurisdiction and authority over the case would never end. Rule 32.14 would create the impossible situation of two courts having simultaneous jurisdiction. At least one Court has already held that under Rule 32.14, that does not occur. *See Maxwell v. State*, 726 S.W.2d 482, 483 (Mo.App.E.D. 1987) (Under Rule

32.14, once transfer from Callaway County Circuit Court to Cape Girardeau Circuit Court was complete, "the Cape Girardeau Court and not the Callaway Court had jurisdiction of the [parties] and the case as if the case had originated in the Cape Girardeau Court").

Finally, this Court must consider the implications of respondent's argument. The probable effect would be chaos. Judges would be able to transfer themselves at will. Receiving courts would have to accommodate the moving judge. It is inconceivable that the intent of the Rules was to permit such disorder.

Except that it is distinguishable, State v. Shriver, 741 S.W.2d 836 (Mo.App.E.D. 1987), would support respondent's position.

In *State v. Shriver*, the state appealed the trial court's dismissal of the information charging Shriver with conspiracy; the state contended Judge Judge Bonacker, "a duly qualified circuit judge in Greene County, 31st Judicial Circuit, had no authority to act on the case after the judge had granted a change of venue to Jefferson County, 23rd Judicial Circuit" because the Missouri Supreme Court had not assigned Judge Bonacker to Jefferson County under Article V, Section 6 of the Missouri Constitution nor had a Jefferson County judge requested Judge Bonacker to sit in the 23rd Judicial Circuit. *Id*. at 837-838.

The sequence of events in Shriver's case was as follows: Shriver's

motion for change of judge was sustained on November 25, 1986, and the case was assigned to Judge Bonacker. *Id*. On December 12, 1986, Judge Bonacker overruled Shriver's motion to dismiss and heard Shriver's motion for change of venue. On December 15, Judge Bonacker granted the motion for change of venue and entered the following order:

> 12/15/86 The Court finds that multi-media publicity concerning defendant Shriver the Back 40 Lounge and the Hitching Post in the Greene County vicinity requires a sustaining of defendant's motion for change of venue. Venue will be changed to the Circuit Court of Jefferson County. *This Judge plans to follow the case and will announce to the parties the date for trial at Hillsboro, MO.* Clerk of the Circuit Court is directed to transmit the original file to the Clerk of the Circuit Court of Jefferson County.
>
> 12/17/86 Defendant's Amended Motion for Bill of Particulars and Notice filed.
>
> 12/22/86 *On change of venue, case ordered transferred to the 23rd Judicial Circuit, Jefferson County, Missouri.* Case set for jury trial beginning at 10:00 o'clock A.M. on Monday, March 16, 1987. All pre-trial motions not previously ruled set for hearing at 11:00 o'clock A.M. on Friday, March 13, 1987. Pre-trial conference set 9:00 o'clock A.M. on Monday, March 16, 1987. *All*

proceedings will be in the Division I Courtroom of Jefferson County before Circuit Judge Don Bonacker, who will be assigned by the Supreme Court. Defendant ordered to appear at all times mentioned above.

/s/ Don Bonacker, Circuit Judge

12/29/86 Entire file, copy of judge's docket sheet and bond mailed this date to Jefferson County (emphasis added).

Id. at 838.

Following the change of venue to Jefferson County, the parties appeared before the judge at least twice when the judge heard various motions. *Id*. The state did not challenge Judge Bonacker's authority until after the judge dismissed the information. *Id*.

The Eastern District first noted, "[a] circuit judge is a judge of the State of Missouri and not merely judge of the circuit in which he is elected or appointed," and that "[u]nless something affirmative appears in the record, it is presumed a circuit judge acts with authority." *Id*. at 838-839; citations omitted. The Court then found "nothing in the record affirmatively showing [Judge Bonacker] did not have authority" to dismiss the information." *Id*. at 839. In the absence of anything in the record showing Judge Bonacker lacked authority to act, the Eastern District held it would "presume he had authority to do so." *Id*.

Here, unlike *Shriver*, relator's actions are not consistent with consenting to, or in any manner agreeing to respondent continuing to have authority or jurisdiction over the case subsequent to the change of venue. To the contrary, the record here is clear that relator promptly challenged Judge Seigel's lack of authority to proceed once he granted the change of venue. For this reason, the instant case must be distinguished from *Shriver*. *Wilson v. Sullivan*, 967 S.W.2d 225, 228-29 (Mo.App.E.D. 1998) (state's failure to promptly challenge judge's authority following change of venue "could be considered a waiver of right to complain").

For the foregoing reasons, respondent's arguments must fail. Relator is entitled to a writ prohibiting respondent from continuing to participate in relator's underlying criminal case.

As to Respondent's Second Point and Argument: Respondent's arguments fail in that 1) because the record provides no indication what respondent relied on in ordering punitive damages in *Nicolay v. Baumruk*, it is not possible to say that the disqualifying bias did not come from an extrajudicial source; 2) an extrajudicial source is not the only basis for a disqualifying bias; 3) punitive damages are akin to aggravating circumstances and respondent's award of punitive damages and associated comments in awarding of punitive damages disqualifies him.

The United States Supreme Court has indicated that an "extrajudicial source" is not the "exclusive" basis for "establishing bias or prejudice." *Liteky v. United States,* 510 U.S. 540, 551 (1994). Neither the evidence in *Nicolay* nor, as described in respondent's brief, the evidence in the other civil cases established that relator's conduct was "so outrageous, extremely intentional and certainly reflects reckless disregard to the rights of others" (Rel.Br. 13).

Respondent contends that "Judge Seigel had a record before him that demonstrated Baumruk committed an intentional shooting of multiple victims in a public place" – but respondent fails to cite to this alleged record in support of this claim (Resp.Br. 32). Respondent next notes,

"Even this Court described Baumruk's actions as a 'reign of terror' and the evidence of guilt as 'overwhelming'" (Resp.Br. 32). Respondent fails to note that *unlike respondent, this Court had before it a complete record of the criminal proceeding*.

Respondent also claims, "Judge Seigel's findings in Nicolay were necessary for the proper disposition of a civil damage case seeking punitive damages for an intentional harm" (Resp.Br. 33). But disposition of the case simply required ruling on all the claims – it was not necessary for Judge Seigel to find that punitive damages were *warranted*.

Respondent attempts to mitigate his comments – indicating he found relator's conduct to be "aggravating circumstances" supporting an award of punitive damages by discussing respondent's correct legal rulings in cases other than *Nicolay*. Correct legal rulings are what justice demands; they are irrelevant to, and do not mitigate, bias.

This Court should not overlook the similarity between aggravating circumstances and punitive damages. The Supreme Court has indicated they are much alike noting that punitive damages "have been described as "quasi-criminal" and "operate as 'private fines' intended to punish the defendant…" *Cooper Industries, Inc. v. Leatherman Tool Co.*, 532 U.S. 424, 432 (2001). A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive

damages is an expression of its moral condemnation. *Id*.

For the foregoing reasons, respondent's arguments must fail. Relator is entitled to a writ prohibiting respondent from continuing to participate in relator's underlying criminal case.

CONCLUSION

For the foregoing reasons, relator is entitled to a writ of prohibition ordering respondent not to continue to proceed in relator's underlying criminal case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises _____ words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, first-class postage prepaid, this ____ day of _____, 20___, to counsel for respondent, Mr. John R. Lasater, Assistant Prosecuting Attorney, 100 South Central, St. Louis, Missouri, 63105, (314) 615-2600, and an email containing a copy of said brief was sent to aforesaid counsel for respondent at JLasater@stlouisco.com, and a true and correct copy was mailed, first-class postage prepaid, to respondent, the Hon. Mark Seigel, St. Louis County Courts Building, Division 3, 7900 Carondelet, Clayton, Missouri 63105 (314) 615-1503.

_____
Attorney for Relator